

United States Court of Appeals For the First Circuit

No. 14-1316

FRANCISCO ABRIL-RIVERA, ET AL.,

Plaintiffs, Appellants,

and

MADLINE AGUAYO, ET AL.,

Plaintiffs,

v.

JEH JOHNSON, Secretary of the Department of Homeland Security; UNITED STATES
DEPARTMENT OF HOMELAND SECURITY; FEDERAL
EMERGENCY MANAGEMENT AGENCY,

Defendants, Appellees.

Before
Torruella, Lynch, and Thompson,
Circuit Judges.

ORDER OF COURT
Entered: November 17, 2015

Plaintiffs-appellants' petition for panel rehearing is granted to the extent of the amendments made to the revised opinion, which will issue this day. The petition for panel rehearing is otherwise denied. The court's opinion issued on July 30, 2015 is withdrawn and the judgment entered on July 30, 2015 is vacated. The Clerk is directed to issue the new opinion simultaneously with this order.

TORRUELLA, Circuit Judge, dissenting. I dissent from the withdrawal of the opinion and effective denial of panel rehearing. The majority here uses withdrawal and revision as a tactic for avoiding a rehearing en banc. This maneuver is merely the converse of that to which I objected in Igartúa v. United States, 626 F.3d 592, 612 n.21 (1st Cir. 2010).

The disposition to reach a pre-determined outcome in this case has been self-evident for some time. It was clearly demonstrated by the majority's ruling in its original panel opinion, which was principally based on its motu proprio raising of the so-called safe harbor defense, see 42 U.S.C. § 2000e-2(h), an affirmative defense never raised, or even mentioned, by Defendants-Appellees before either the district court or this Court. See Abril-Rivera v. Johnson, 795 F.3d 245 (1st Cir. 2015) (withdrawn). This was, of course, not only an unusual and unjustified judicial action but a clear violation of longstanding circuit and judicial precedent. See FDIC v. Ramírez-Rivera, 869 F.2d 624, 626 (1st Cir. 1989); Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 15 F.3d 1222, 1226 (1st Cir. 1994); see also Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1012 (11th Cir. 1982). Faced with a dissenting opinion objecting to this inappropriate procedure and subsequent petition for rehearing and rehearing en banc drawing upon that dissenting opinion, the majority withdrew its reliance on this erroneous reasoning.

By the Court:

/s/ Margaret Carter, Clerk

cc: Hon. Daniel R. Dominguez, Ms. Frances de Moran, Clerk, United States District Court for the District of Puerto Rico, Mr. Arias-Marxuach, Mr. Bruno-Rovira, Mr. Charnes, Mr. Ortiz Garcia, Ms. Gautier, Mr. Roman-Negron, Mr. Calderon, Mr. Jed, Mr. Perez-Sosa, Mr. Webb, & Ms. Sanchez-Pares.